INTERNATIONAL LAW AND INTERNATIONAL POLICY[1]

BY DAVID JAYNE HILL

AT no time, perhaps, since history began to be recorded, has there existed so profound and so universal a conviction of the value and necessity of law; and particularly of the restraint of law in controlling the activities of independent sovereign States.

Everywhere the necessities, even more than the volitions, of men have in some form, established the authority of the State; whose laws, even though occasionally violated, are regarded as paramount over the populations within their jurisdiction. A comparative study of law discloses the fact, that, with slight and almost negligible divergences, the great principles of jurisprudence accepted in all the most highly developed communities are not only similar but virtually identical. As a result, that body of customary law common to different nations, to which the Roman jurisconsults gave the name *Jus Gentium,* and which became the basis of what we now call International Law, was believed until the events of the Great War disturbed the conviction, to have attained a consistency of content and a degree of general acceptance by responsible States which placed beyond all serious question its authority as law.

There is, as we all know, some diversity of view as to what constitutes the law in general. If it were otherwise it would be a very stale and unprofitable profession.

As regards the Law of Nations, which has temporarily fallen into disrepute as even more vague and uncertain than other branches of the law, whoever is able to discover what it is may have the satisfaction of declaring that, not-

[1] A portion of an address delivered before the New York State Bar Association.

withstanding the aspersions cast upon it, there is the highest authority, based on judicial decisions, for asserting with Sir William Blackstone that, "whenever any question arises which is properly the object of its jurisdiction," it is in England "adopted in its full extent by the Common Law, and is held to be a part of the law of the land"; and he may also cite the opinion of Alexander Hamilton, that it is not only a part of the Common Law, but "has become by adoption that of the United States."

If these vindications of the respectabilty of the Law of Nations seem somewhat antiquated, I may, perhaps, be permitted to recall the fact that, in his address before the New York State Bar Association, last year, the eminent Attorney-General of Great Britain, Sir Frederick Smith, informed his hearers that when, during the war, it became his official duty to urge upon the Privy Council the idea that no prize court in Great Britain had the right to challenge or call in question the Orders in Council of His Majesty the King, the Appellate Prize Court decided against the contention of the Attorney-General and declared: "We sit here as a Court of International Law, and in spite of what our enemies have done we still believe there are binding doctrines of International Law, and sitting here as we do sit as a Court, whose duty it is to construe those doctrines, we utterly refuse to be bound by Orders in Council issued by the Executive."

It is a grateful and refreshing assurance to all those who believe in and love the reign of law, to know that there is, in at least one country in the world, a Court that, even in the midst of war, has the purity and the sense of responsibility to assert, against the Law Officers of the Crown, that it will take no orders from those whose authority is merely the national interests of the moment; but it is still more reassuring to know that, in the judgment of such a Court, International Law, despised, rejected, and reviled by those who should be its champions, not only lives and speaks with a voice of authority, but that its voice commands silence on the part of the interests even of the State.

Happily, this is no new doctrine. For us, as Mr. Justice Gray, speaking for the Supreme Court of the United States, has said, in the case of *The Paquete Habana,* in 1899, "International Law is part of our law, and must be ascertained and administered by the courts of justice of

appropriate jurisdiction, as often as questions of right depending upon it are duly presented for determination"; and it is no reflection upon the loyal adherence of the United States to this principle that, in appealing to International Law as binding in questions of prize, the British Prize Courts have themselves applied the decisions of American judges to which objection was once raised in the period of the Civil War.

Even a moment's reflection will show that, in determining to decide cases of prize by the Law of Nations, and not under the Orders in Council of the King, the British Court was following a rule of action that was less warped by private interest and more influenced by the spirit of equity. It was, in fact, deciding according to International Law, because it is better law.

And why is it better law? It is better law, because it is in no sense *ex parte*. It is law fit to be made universal. Even in the more liberal-minded States, the development of law is under the restraint of the class of interests that have acquired power, whatever they may be, and proceeds with little control by interests that are just as real but less influential.

When it comes to the absolute governments, there, Law is merely a decree; and is in no sense based upon its true foundation, which is mutual obligation, recognized and rendered effectual by reciprocal agreement to adopt a controlling principle. It is of the very essence of absolutism that it is against every principle that will bind itself, and for every advantage that will increase the power of the ruler over the ruled.

Now the underlying conception of the Law of Nations is this: that there are, in this realm of legal relations, no rulers who alone can make the law, and no subjects who are compelled to submit to it. It is a realm in which the jurist seeks to discover what is just; and the nations, after considering whether or not it is so, agree to accept and abide by the results.

It did not take long for independent minds seeking new foundations for the State, to perceive that, underlying this conception of law, there is the basis of a new system of political philosophy, the idea of natural rights; which, from the time of Grotius, had been given wide publicity as a revival of doctrines fundamental to the Roman Law.

It had not been very distinctly recalled, until a foreigner, Professor De Lapradelle, reminded us, that, from 1758 to 1776, when American political conceptions were in process of formation, the great jurists who wrote of Natural Law as the basis of the Law of Nations, such as Grotius, Pufendorf, and Burlamaqui, "were read, studied, and commented upon in the English colonies of America." As early as 1773, the Law of Nations was taught in King's College (now Columbia University), and "in 1774 Adams, and in 1775 Hamilton, quote or praise Grotius and Pufendorf."

A very considerable influence appears to have been exercised upon our revolutionary fathers by the Swiss jurist, Vattel, whose work on "The Law of Nations or the Principles of Natural Law" was inspired by a spirit of political liberalism, that was without precedent. No previous writer had ventured to class a sovereign as a criminal, but Vattel had the courage to write:

"If then there should be found a restless and unprincipled Nation, ever ready to do harm to others, to thwart their purposes, to stir up civil strife among their citizens, there is no doubt but that all the others would have the right to unite together to discipline it, and even to disable it from doing further harm."

Not hesitating to place such nations in the criminal class, he does not shrink from applying to them the rigors of the criminal law. "They should be regarded," he says, "as enemies of the human race, just as in civil society persons who follow murder and arson as a profession commit a crime not only against the individuals who are victims of their lawlessness, but against the State, of which they are the declared enemies." And, in closing his paragraph with the recommendation of punishment, he adds, "Of that character are the various German tribes of whom Tacitus speaks."

Three copies of Vattel's book, brought out in a new edition specially adapted for America, in 1775, by Dumas, a Swiss republican resident in Holland, were sent to Franklin; who, in acknowledging it, says: "It came to us in good season, when the circumstances of a rising State make it necessary frequently to consult the Law of Nations." One copy was sent to Harvard College, another was deposited with the Library Company of Philadelphia, and of Frank-

lin's own copy he says, "it has been continually in the hands of the members of our Congress now sitting."

States, according to this teaching, are subject to the principles of "right reason," supplemented by compacts freely made between them. Thus, in the minds of the colonial statesmen of America, in connection with the Common Law they had brought from England, law, in its political sense, came to be identified with covenants of peoples or covenants of States, freely entered into, in a manner explicit or implicit. Constitutions, statutes, and treaties had, in their view, the same ultimate authority, the rights of man: Constitutions as concessions to the necessity of government, which they limited and defined; statutes as concessions to the necessity of civil order, within the limits of ordained government; and treaties as concessions to the necessity of coexistence, harmony, and safety, between independent States.

Quite logically, for the first time in history, they wrote into the Federal Constitution the remarkable words: "This Constitution and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding." (Article VI).

I have referred to these as "remarkable words," because they not only recognize in treaties the quality of legal perfection, but actually incorporate the covenants entered into by the United States as constituting equally with the Constitution itself, "the Supreme Law of the Land."

In this the action of the United States stands alone, the highest tribute ever paid to the authority of law.

In this country there has never been any doubt that international morality is binding upon sovereign States; but not in a strictly legal sense. Nor is it possible to consider as law, in its proper meaning, those usages which are not in harmony with the social standards and necessities of the present age. In so far as these elements in the Law of Nations are antiquated or without the authority created by consent, the fields of activity they cover need to be provided for in a new fashion, namely, by duly considered special agreements.

It is, therefore, necessary to place emphasis upon the other element in the Law of Nations, which is incontestibly not only perfect law, according to the most severe criteria of legality, but the most perfect example of law-making in the whole broad field of legislation. I refer, of course, to treaties and conventions, freely and deliberately negotiated, and ratified by a constitutionally authorized legislative body.

It is impossible, in view of the modern methods of law-making, any longer to accept the idea of law expressed in the classic definition of the distinguished English jurist, John Austin, who defines law, as "The commands issued by a sovereign authority to persons in general subjection to it"; which is a description of law in an order of things that has, for the most part, passed away.

Under such a definition, there could, of course, be no place for International Law,—a law created between sovereign States for their mutual governance; nor could there be law of any kind, in the modern legislative sense, for any self-governing people. Where may we look for a "sovereign authority" that can issue "commands" to sovereign States?

Such an authority would be a superstate, a new entity, holding formerly sovereign States "in general subjection to it."

And yet, sovereign States, which do not, and cannot, subordinate themselves without self-extinction, to a supernational authority, do and must create law for the regulation of their own conduct toward one another,—a law not imposed from above, but created by themselves, valid and binding between them;—in strict and literal expression, a law *inter*national.

It would, I think, not be an error to say, that International Law, when made by general treaties, illustrates the perfection of the law-making process; because it is the result of a mode of procedure in which there is a complete substitution of agreement for command. If it is true, that government by the consent of the governed is the highest political ideal; then the agreements of parliaments, congresses, councils, and legislatures representing the people are the highest type of law; and, indisputably, international treaties and conventions, ratified reciprocally by legislative bodies, are the most perfect examples of this type.

They possess an ideal authority which no other form of law can surpass.

Under this system, a great body of positive law, freely and deliberately agreed upon, and to a great extent with the added quality of unanimity, has been written into treaties and conventions solemnly and duly ratified, according to the laws of each signatory Power.

In the development of this procedure, the United States has been a leader, because it has introduced the participation of a representative legislative body in the treaty-making process. The law-making treaties of the United States are of their very essence examples of positive law, not only because treaties are declared by the Constitution to be "the Supreme Law of the Land," but because they require the specific approval of the highest legislative branch of the Government.

Originally, before the adoption of the Constitution, under the Articles of Confederation, the making of treaties was the duty of the Congress; but, being feeble as an executive, Congress found itself confronted with the more difficult task of making them respected. In 1786, Washington, in a private letter, wrote to Jay, the accusation that the legislatures of the States were violating the treaty of peace with Great Britain "was greeted by them with laughter." The States had not all developed the sense of national responsibility; but national responsibility was the imperative need, if the Union was to endure, and that is what was created by the provisions of the Constitution in the Convention of 1787.

In a letter written by Jay to the States of the Confederation, on April 13, 1787, and approved by the Congress, it was declared: "Contracts between nations, like contracts between individuals, should be faithfully executed, even though the sword in the one case and the law in the other, did not compel it. Honest nations, like honest men, require no restraint to do justice; and though impunity and the necessity of affairs may sometimes afford temptations to pare down contracts to the measure of convenience, yet it is never done but at the expense of that esteem, and confidence, and credit which are of infinitely more worth than all the momentary advantages which such expedients can extort."

In this spirit was the constitutional provision made,

that the engagements of treaties and the rules of action to which they pledged the signatories, should, in the United States, at least, *themselves* possess the quality of being the supreme law of the land.

As Mr. Chief Justice Marshall afterward stated, speaking for the Supreme Court of the United States: "A treaty is to be regarded in Courts of Justice as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision." And, indeed, the making of treaties very narrowly escaped remaining, under the Constitution, what it had been under the Confederation, an act entrusted to the legislative branch alone. It was only toward the end of the sessions that the previous method was modified.

"It was evident," says Farrand, in his "Framing of the Constitution," "that the convention was growing tired. The committee had recommended that the power of appointment and the making of treaties be taken from the Senate and vested in the President, by and with the advice and consent of the Senate. With surprising unanimity and surprisingly little debate," he adds, "these important changes were agreed to."

By this division of the process of treaty-making, the Executive was, in effect, charged with the duty of recommending legislation which he might find desirable and practicable, but upon which a truly legislative seal was to be placed only with the advice and consent of a law-making body.

Regarding the motives for this decision, Alexander Hamilton wrote, in "The Federalist": "However proper and safe it may be in governments where the executive magistrate is an hereditary monarch, to commit to him the entire power of making treaties, it would be utterly unsafe and improper to entrust that power to an elective magistrate of four years' duration. . . . The history of human conduct does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind, as those which concern its intercourse with the rest of the world, to the sole disposal of a magistrate created and circumstanced as would be the President of the United States.

"To have entrusted the power of making treaties to the Senate alone," he continues, "would have been to relin-

quish the benefits of the constitutional agency of the President in the conduct of foreign negotiations. . . . Though it would be imprudent to confide in him solely so important a trust, yet it cannot be doubted that his participation would materially add to the safety of the society. It must indeed be clear to a demonstration that the joint possession of the power in question, by the President and Senate, would afford a greater prospect of security than the separate possession of it by either of them."

The judgment of American statesmen and the results of experience have confirmed the view expressed by Hamilton. It has been the custom of the Executive, in matters of large import, to avail itself of " the advice and consent of the Senate," at all stages of negotiation; and, in fact, the need of negotiations on particular subjects has sometimes been first brought to the attention of the Executive by the legislative branch of the government. Much of this exchange of views is not, however, a matter of record; for it has been in great part oral, and the nature of the questions under discussion often rendered these private conversations too delicate to be given publicity when opinion on all sides was still merely in a state of formation by the competent participants.

It is, however, a notable fact, that the traditions of the Senate have always been tenacious regarding the responsibility which the Constitution places upon it, and justly so; for, if treaties are not merely executive engagements, and in reality are both supreme law binding upon the nation and destined to affect and to modify, to its benefit or to its injury, the whole fabric of International Law, such engagements become the most solemn transactions which it is the duty of a government to perform. As it is the function of the Congress to judge of the causes for which, and the occasions when, it may be necessary to declare war, it is not unreasonable that one branch of it, at least, should interest itself in the conditions which may determine the vital questions of future peace; and nothing is so closely connected with the possibilities of war and peace as the engagements into which nations mutually enter by formal treaties. Involving, as they do, pledges of action as well as pledges of abstention, they may easily contain, under the smoothest and most peaceful forms of expression, the most pestilent seeds of future discord.

In the year 1899, and again in 1907, an opportunity was afforded, at the two Hague Conferences, to perform a large task in improving International Law by law-making treaties.

The results were less than had been hoped for, but they marked an advance upon anything that had before been attempted. Notwithstanding the efforts made by Germany and her allies to prevent any general understanding based on the authority of law, an important *corpus juris* of an international character had been brought into existence, which even the obstructive Powers had, under the pressure of public opinion, found it expedient to accept, and had solemnly given their pledges to observe.

It was no outworn and obsolete rules of conduct, but laws as authoritative as human ingenuity can devise that have been openly, shamelessly and brutally violated by nations claiming to rank among the most highly cultivated of modern peoples. By our constitutional provision, these laws, embodied in a series of treaties duly ratified and proclaimed, were not only laws to which we had subscribed, they were an integral part of the supreme law of the United States.

I bring no accusation of negligence; but I do not hesitate to say, that an immediate and earnest protest against the first violation of these laws was not only justified, but a duty which this nation owed to the dignity of the law itself.

I submit, that there is no question before the delegates of the Powers victorious in the Great War, now assembled in Paris to conclude a world peace, that compares in import and consequence to mankind with the issue: What, in the future, is to be the authority of International Law? To what end are new geographic boundaries to be drawn on the map of Europe and of the world, oppressed nations to be endowed with a right of self-determination which needs to be guaranteed by others, territories restored to their rightful national connection by a treaty of peace, and partial reparation made for reparable damages inflicted, if International Law is to be left without permanent defense?

This then is the fundamental issue of the hour. The whole edifice of law is menaced, not merely in its superstructure, but at its foundations; for, in the modern conception of it, it is not a system of regulations imposed from

above, and always and everywhere enforced by the physical power of the stronger against the will of the weaker; but a system arrived at by the voluntary consent, and maintained by the voluntary support of those who believe in the essential dignity and authority of law.

What then is to be done to maintain that authority?

Up to this point, I believe, I have said only that upon which we can all substantially agree. But when we come to methods of sustaining the law we leave the domain of law in its proper sense and pass into the realm of policy; which is, to a certain degree, a field of theory.

Here I shall not presume to enter, either to construct or to destroy the fabrics of the mind. My firm conviction is that we shall do well to avoid the magical charm of phrases and catchwords, and to fix our attention upon realities.

The authority of International Law rests on national character. We cannot change that by forming new partnerships, and particularly not by receiving into them a doubtful member, in the hope of rendering the defaulter and the embezzler an honest man by giving him an interest in a business for which we are to furnish the most of the capital.

I profoundly distrust the professions and the plausibilities of death-bed repentances, even among nations; and also the improvements of society which result from merely emotional impulses. If we are to build wisely, we shall build on the foundations of tested knowledge and experience. We shall put no trust in any "scrap of paper," no matter with what pious phraseology it may be inscribed, except in so far as we know that there are both strength and character behind it. We went into this war a free people. Let us come out of it a free people. Men talk glibly of world federation. What does it mean. It means, if it signifies anything, that this nation, with other nations, is to place itself under some kind of a central authority, with power to raise and expend taxes, to organize and command armies, to regulate the trade and commerce of the world, and upon occasion to declare war—powers which, under our National Constitution—the most far-seeing document of government ever written by the hand of man—are placed solely in the control of the responsible representatives of the people of the United States.

Those powers will, I believe, never be transferred to a new nation, of which the United States would be only a parochial part; nor will they ever be subject to being overruled by the decisions of any association whatever, without the free consent of our own law-making bodies.

We have, during the war, put to the test the strength of our free institutions, and we have found them adequate for war as well as for peace. They have been adequate, because we have never for a moment lost the conviction that we are a free people, and that we were acting in perfect freedom. Had the matter of our food been under the control of a supernational body, had our young men been ordered by an authority not American to leave their business and report for conscription to cross the sea and fight at the dictation and in the interest of a foreign people, had the occasion called for action that was in any degree doubtful to the American conscience, this people would not have made the sacrifices of life and treasure which they have gladly made with unreluctant consecration of mind and body.

There is a limit to national, as there is to personal responsibility. Nationally, that limit is defined by the maintenance and vindication of law. I fear the imperial sodality of Great Powers associated for any other purpose. No condominium has ever been free from jealousies and friction. Even so trifling a partnership as the control of the Samoan Islands was a thorn in the side of three nations until it was dissolved. Every such condominium has ended either in quarrel or partition, or in both; and the net result is always merely deferred annexation. A partnership for equal economic opportunities among unequal nations offers the prospect of unexpected demands; which, if not granted, will lead to the accusation of bad faith.

How then can we find a *modus vivendi* for sovereign States? How, indeed, if not in a united support of law, the recognition of their equal freedom and their mutual obligations? Law does not require a renunciation of rights; it affirms, guarantees and protects them. That is its very purpose and its whole significance.

Let there be then a union for the maintenance of the law. Such a union now happily exists. It consists of the nations that have had the force and the courage to enter the war, in order to bring the law-breakers to justice, and

of no others. I say of no others, because a nation is of value in providing a real sanction to the authority of law only when it is ready to defend the law. A neutral nation at best only renders a passive respect to the authority of the Law of Nations. In the cause of equity it is not an asset, it is only a liability.

I, of course, do not overlook the fact that the prevention of war is of great interest to neutrals, for they are necessarily involved in its hardships by the restriction of their trade. In a speech delivered by the late Lord Parker, a short time before his death, he predicted that, if in future it were made clear that there could be no neutrality, the danger of war would be minimized, because its risks would be increased. Then all nations would be more anxious to prevent it, in so far as it is in their power to do so. Mediation would be a necessary act of self-preservation; and for this there is full justification. There is an old English form of indictment, I am told, that bases arrest on the violation of "the peace and dignity of the King." There may well be a form of international indictment against those who would disturb the peace and dignity of mankind.

For my own part, speaking now as a realist, I look for the prevention of war chiefly to the command of the sea. I do not rest my faith on "the freedom of the sea"—we have seen what that may mean—but on the law of the sea; and that law should be simply the principle set up in opposition to the unlimited right of war, for which the Entente Allies have been fighting, namely, the inviolability of the innocent.

On the 20th of November, 1918, the culprit fleet of Germany—in the presence of British, American and French warships—coming forth from its lair, marshalled by the British light cruiser Cardiff, swept across the North Sea through the morning mist in gloomy procession, to be shepherded into captivity. "Ignominious and yet magnificent," as a writer describes them, the Seydlitz, the Moltke, the Derfflinger, the Hindenburg, and the Von der Tann, boastful battle cruisers, the pride of the German Emperor, that had long celebrated "The Day" when commanding the empire of the sea they could bring the world into subjection, swept through the mist, followed by the nine battleships, then the fifty destroyers and the great flotilla of guilty submarines. "It's a fine sight," a sailor exclaimed,

" but I wouldn't be on one of those ships for all the world."

Unconsciously, this lad felt in his heart what every true sailor hopes will be the future law of the sea. It was on the sea that International Law had its birth in the old sea codes, the " Table of Amalfi," the " Consolato," the " Jugemens d'Oléron," and the " Laws of Wisby," which made the sea, because it is the highway of the world, a place where above all others the rights of man should be respected and maintained. Brave to battle with wind, and wave, and storm, the true sailor scorns a Power that would add to the struggle with nature the inhumanity of man. The sea is the realm of humanity's defense. Closed by the will of all civilized peoples to the greed of the pirate, the united navies of the Entente must make its law the inviolability of the innocent. And this can be done.

If the Entente Allies, who have fought together in this war to vindicate the rights of nations, are not to be trusted, and there is in them no soul of honor, then the outlook for mankind is, indeed, a hopeless one. But if they can be trusted in so great a matter, the formula for the defense of right is very simple.

I take a leaf from the diplomatic correspondence of the British Secretary of State for Foreign Affairs, then Sir Edward, now Viscount Grey.

Writing to M. Paul Cambon, French Ambassador in London, on November 22nd, 1912, he said: " You have pointed out that, if either Government had grave reason to expect an unprovoked attack by a third Power, or something that threatened the general peace, it might become essential to know whether it could in that event depend upon the armed assistance of the other. I agree that, if either Government had grave reason to expect an unprovoked attack by a third Power, or something that threatened the general peace, it should immediately discuss with the other whether both Governments should act together to prevent aggression and to preserve peace, and, if so, what measures they would be prepared to take in common."

This understanding was a menace to no honorable nation. It was, in fact, one in which all honorable governments might join. It suppressed no one's freedom; it looked toward peace, and not toward war; and it has saved Europe!

A more inclusive formula might possess the same qual-

ities and serve the same purpose. It might read: "We, the signatories, agree that, if peace should be anywhere threatened, we will together inquire into the cause of aggression; and if we find that the Law of Nations has been anywhere violated, we will by mediation together use our best endeavors to avoid strife. If war is begun, we will together consider what measures we should take in common. And we mutually agree to submit any difference we may have with one another or with other nations to a like mediation. To this end we continue our close association of intimate counsel, and will receive into our understanding other governments when circumstances may render it proper to do so."

I am here making no proposal. I claim no title to do that. I am merely suggesting a possibility, but a more definite one than some others that have been strongly urged. To many minds it may seem too attenuated, too much dependent upon good will and a common purpose. To that I have only to say this. Without good will and without a community of purpose there is no agreement and there is no sure keeping of engagements among men. Underlying all human endeavor and cooperation, the strongest motive is a love of freedom. Unless they are forced to yield to some type of imperialism—personal, national, or multiform—which they will never cease to resent, men who believe that there is no true government that is not founded upon the consent of the governed, will not consider themselves bound, even by the authority of the law, if they discover that by its mandates they are no longer free.

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